

STATE OF MAINE
SUPREME JUDICIAL COURT

CORRECTIONS TO AMENDMENTS TO THE
MAINE RULES OF CIVIL PROCEDURE

2008 Me. Rules 14

Effective: August 1, 2008

All of the Justices concurring therein, the amendments to the Maine Rules of Civil Procedure, adopted by 2008 Me. Rules 12, are corrected as follows.

1. The amendment to Rule 34 (b) of the Maine Rules of Civil Procedure should have read as follows:

(b) Procedures. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that

defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, including an objection to the requested form or forms for producing electronically stored information, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. If objection is made to the requested form or forms for producing electronically stored information, or if no form was specified in the request, the responding party must state the form or forms it intends to use. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to produce or to permit inspection as requested.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request. If a request does not specify the form for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form that is reasonably usable. A party need not produce the same electronically stored information in more than one form.

A party upon whom a request is served to produce the party's medical, employment or other records in the possession of a third party may, at the party's option, produce in place of such records an effective written authorization by which the submitting party may obtain the requested records. Within 10 days of receiving records pursuant to the authorization, the party submitting the request shall serve upon the authorizing party a complete copy of the records so obtained.

2. Rule 37(f) of the Maine Rules of Civil Procedure as adopted by 2008 Me. Rules 12 is corrected to become Rule 37(e) as follows:

(e) Electronically Stored Information. Absent exceptional circumstances, the court shall not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system.

Advisory Committee Note (Amended) – July 2008

Rule 37 (e) is adopted to address the discovery of electronically stored information. Corresponding amendments have also been made to Rules 16, 26, 33, and 34. The amendment to Rule 37 (e) is intended to protect parties who may have lost electronically stored information "as a result of the routine, good-faith operation of an electronic information system." The amendment is identical to the 2006 amendment to F.R.Civ.P. 37 (e), whose Advisory Committee's Notes and case law should be consulted for guidance.

The amendment to Rule 37(e) is in effort to balance two interests. First, a party should not be sanctioned or subject to a claim of spoliation of evidence if electronically stored information is lost or altered as a result of the good-faith operation of the party's electronic information system. The amendment recognizes

that electronic information is dynamic, subject to routine alteration or deletion, and may not always be available in the same form as when the events giving rise to the case took place. Second, the rule also recognizes that the dynamic nature of electronically stored information is not a license to create or maintain an environment in which relevant evidence is rendered unavailable. The rule seeks to balance these interests by requiring that the protection of the rule extends only to the operation of an electronic information system that is both "routine" and "good faith."

Obviously, the requirement that the operation of the information system be "routine" requires that the operation be in the ordinary course of business. At the same time, "good faith" may require an intervention to ensure that information is not lost. As the federal Advisory Committee Note makes clear, "[G]ood faith in the routine operation of an information system may involve a party's intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation. . . . The good faith requirement of Rule 37 (e) means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations while allowing that operation to continue in order to destroy specific stored information that it is required to preserve." One of the sources of such a requirement may be a "litigation hold" order or agreement that might be created in the discovery conference process under Rule 16 (a). A party receiving a litigation hold request before or during suit would be well advised to take reasonable steps to protect the information pending a ruling from the court.

Although the amendment to Rule 37 (e) provides that a party will not be sanctioned under the circumstances the rule contemplates, if a party is found to have rendered electronically stored information unavailable by means not the result of the "routine, good faith operation in an electronic information system," the court has broad powers to make appropriate orders and to sanction the offending party.

Dated: July 30, 2008

FOR THE COURT

/s/
LEIGH I. SAUFLEY
Chief Justice